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9
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

10 WILLIAM SILVERSTEIN, individually and
11 on behalf of all other California residents
similarly situated,

12 Plaintiffs,
13 v.

14 KEYNETICS INC., a Delaware corporation;
15 CLICK SALES INC., a Delaware corporation;
16 418 MEDIA LLC; an Ohio Limited Liability
Company; and DOES 1-100,

17 Defendants.
18

Case No.: 16-CV-00684-DRM

**DEFENDANTS 418 MEDIA LLC'S AND
LEWIS HOWES' REPLY MEMORANDUM
OF POINTS AND AUTHORITIES IN
SUPPORT OF MOTION TO DISMISS FIRST
AMENDED COMPLAINT**

Date: April 14, 2016
Time: 11:00 a.m.
Crm,: 4, 3rd Floor
Judge: Hon. Donna M. Ryu

1 **I. INTRODUCTION**

2 Defendants 418 Media LLC and Lewis Howes have moved to dismiss Plaintiff William
 3 Silverstein's ("Plaintiff") First Amended Class Action Complaint for Violations of California
 4 Restrictions on Unsolicited Commercial E-mail (Cal. Bus. & Prof. Code § 17529.5) (the "Complaint"
 5 or "FAC"). There are three separate and independent reasons why this Motion to Dismiss should be
 6 granted. First, Plaintiff's claim for violation of Section 17529.5 is preempted by the Controlling the
 7 Assault of Non-Solicited Pornography and Marketing Act of 2003 ("CAN-SPAM Act"). Second, the
 8 Complaint does not plead any wrongdoing by Howes. Third, the Complaint fails to satisfy the
 9 particularity requirement for pleading alleged violations of Section 17529.5, as it does not provide any
 10 details regarding the allegedly illegal e-mails, such as the dates of the emails, the senders of the
 11 emails, the subject lines of the emails, or the allegedly false or misleading content of the e-mails.
 12 While the Complaint could conceivably be amended to provide more details concerning the emails at
 13 issue, it is clear that the first two defects are not curable by amendment, and, accordingly, the
 14 Complaint should be dismissed with prejudice as to 418 Media LLC and Howes.

15 **II. ARGUMENT**

16 **A. The Federal CAN-SPAM Act Preempts Plaintiff's Claim for Violation of**
 17 **Business and Professions Code § 17529.5 (a)(1) and (2)**

18 Plaintiff's claim for violation of Business and Professions Code § 17529.5(a)(1) and (2), must
 19 be dismissed, as it preempted by the Controlling the Assault of Non-Solicited Pornography and
 20 Marketing Act of 2003 ("CAN-SPAM Act"), 15 U.S.C. §§ 7701, *et seq.*

21 **1. The Preemption Provision of the CAN-SPAM Act**

22 The CAN-SPAM Act "supersedes any statute, regulation, or rule of a State or political
 23 subdivision of a State that expressly regulates the use of electronic mail to send commercial messages,
 24 except to the extent that any such statute, regulation, or rule prohibits falsity or deception in any
 25 portion of a commercial electronic mail message or information attached thereto." 15 U.S.C. §
 26 7707(b)(1). "The preemption clause reflects one of the primary goals of the CAN-SPAM Act: to
 27 regulate commercial electronic mail 'on a nationwide basis.' (15 U.S.C. § 7701(b)(1).) As stated in the
 28 congressional findings accompanying the Act, the federal statute was intended ... to implement one

1 national standard regarding the content of commercial e-mail because ‘the patchwork of state laws had
 2 proven ineffective’” *Rosolowski v. Guthy-Renker LLC*, 230 Cal. App. 4th 1403, 1412 (2014)
 3 (citations and quotations omitted).

4 Thus, the CAN-SPAM Act expressly preempts all state laws related to spam email, except to
 5 the extent that a state law “prohibits falsity or deception in any portion of a commercial electronic
 6 mail message or information attached thereto.” 15 U.S.C. § 7707(b)(1). The Ninth Circuit explained
 7 the scope of this preemption in *Gordon v. Virtumundo*, 575 F.3d 1040, 1061-1062 (9th Cir. 2009), in
 8 which it held that “the express language of § 7707 demonstrated Congress’s intent that the CAN-
 9 SPAM Act broadly preempt state regulation of commercial email with limited, narrow exception,”
 10 and further held that “the exception language, read as Congress intended, refers to ‘traditionally
 11 tortious or wrongful conduct.’”

12 **2. Plaintiff’s Claim for Violation of Section 17529.5(a)(1) Is Preempted**

13 Section 17529.5(a)(1) provides that it is unlawful to send a commercial e-mail advertisement
 14 that “contains or is accompanied by a third-party’s domain name without the permission of the third
 15 party.” Plaintiff alleges that Defendants violated Section 17529(a)(1) by sending emails “from the
 16 domain *linkedin.com*” that “violate[d] LinkedIn’s user agreement ...” (FAC ¶ 30).

17 In their Opposition, Plaintiff submits that “Section 17529.5(a)(1) prohibits falsity and
 18 deception because using the domain name of a third party conceals the identity of the actual sender of
 19 an email” (ECF No. 14, p. 6:17-18), and, therefore, their claim for violation of Section 17529.5(a)(1)
 20 is excepted from preemption. Plaintiff cites no cases supporting this position, nor are there any.
 21 Rather, California and federal court have consistently held that the CAN-SPAM Act preempts claims
 22 based on allegations that e-mails used domain names that did not accurately identify the sender. *See*,
 23 *e.g.*, *Kleffman v. Vonage Holdings Corp.*, 2007 U.S. Dist. LEXIS 40487, *4 (C.D. Cal. May 23, 2007)
 24 (holding that CAN-SPAM Act preempted Section 17529.5 claim based on allegation that emails sent
 25 by defendant did not identify defendant in the domain name); *Asis Internet Servs. v. Member Source*
 26 *Media, LLC*, 2010 U.S. Dist. LEXIS 47865, *13-*14 (N.D. Cal. Apr. 20, 2010) (stating “[t]here is
 27 nothing inherently deceptive in . . . [the] use of fanciful domain names” and holding that “the §
 28 17529.5 claim based on the headers . . . is therefore preempted.”) (citation omitted).

1 **3. Plaintiff's Claim for Violation of Section 17529.5(a)(2) Is Preempted**

2 Plaintiff's claim for violation of Section 17529.5(a)(2) is based on the allegation that "the
 3 From Names all misrepresent *who* is advertising in the spams."(FAC ¶ 34). This claim is clearly
 4 preempted by the CAN-SPAM Act. As explained by the California Supreme Court, in *Kleffman v.*
 5 *Vonage Holdings Corp.*, 49 Cal. 4th 334, 346 (2010), "a state law requiring an e-mail's 'from' field
 6 to include the name of the person or entity who actually sent the e-mail or who hired the sender
 7 constitutes 'a content or labeling requirement' that 'is clearly subject to preemption.'"

8 **B. The First Amended Complaint Must Be Dismissed As To Howes Because Plaintiff**
 9 **Does Not Allege Any Wrongdoing By Howes**

10 Howes should be dismissed from the lawsuit, because the Complaint does not allege any
 11 wrongdoing by Howes. Indeed, the only allegation concerning Howes in the Complaint is that he
 12 "owns and operates 418 Media LLC." (FAC ¶ 18). Plaintiff's Opposition does not dispute that the
 13 claim against Howes is insufficiently pled, and does not identify any amendments that could be made
 14 to the Complaint in order to assert a viable claim against Howes. Therefore, the Court should dismiss
 15 the Complaint with prejudice as to Howes.

16 **C. Plaintiff's Claim for Violation of Business and Professions Code § 17529.5 Is Not**
 17 **Pled With the Requisite Specificity**

18 Plaintiff's claim for violation of Business and Profession Code § 17529.5 must be dismissed,
 19 because it is not pled with the particularity required by Rule 9(b) of the Federal Rules of Civil
 20 Procedure.

21 California district courts have consistently held that claims for violation of Business and
 22 Professions Code § 17529.5 sound in fraud, and that the contents of the emails allegedly violating the
 23 statute must be plead with particularity. *See, e.g., Asis Internet Servs. v. Optin Global, Inc.*, 2006 U.S.
 24 Dist. LEXIS 46309, at *14 (N.D. Cal. June 30, 2006) (holding that claims brought under Section
 25 17529.5 must be plead with particularity, including "the contents of the emails themselves, including
 26 their headers and subject line information ..."); *Asis Internet Servs. v. Subscriberbase Inc.*, 2009 U.S.
 27 Dist. LEXIS 112852, *9-*13 (N.D. Cal. Dec. 4, 2009) (holding that "plaintiffs must plead their claim
 28 for violations of section 17529.5 with particularity" and "at the very least, submit an appendix that

1 contains each subject line, the total number of emails that bore it, and specific information about each
 2 email that bore it, including the sender, the date it was sent, and the landing site to which the email
 3 directs the recipient.”); *Asis Internet Servs. v. Consumerbargaininggiveaways, LLC*, 622 F. Supp. 2d 935,
 4 945 (N.D. Cal. 2009) (finding that a complaint for violation of Section 17529.5 was not plead with the
 5 requisite particularity as “it provides only general allegations and a few examples of the allegedly
 6 misleading emails.”); *Hypertouch, Inc. v. Azoogle.com, Inc.*, 2009 U.S. Dist. LEXIS 25999, *3 (N.D.
 7 Cal. Mar. 19, 2009) (dismissing a claim for violation of Section 17529.5 because it was not plead with
 8 the requisite particularity). While Plaintiff submits that the foregoing cases are all anomalous and that
 9 Defendants are “ignora[nt] of what these cases hold” (ECF Doc. No. 14, p.9:2-3), Plaintiff is unable to
 10 provide any countervailing authority supporting its assertion that its claim for violation of Section
 11 17529.5 is not required to be plead with specificity.

12 Although the Complaint purports to attach “a representative sample” of the emails at issue as
 13 an exhibit (Complaint ¶ 15), it does not do so. Also, with respect to the emails that purportedly
 14 advertised *linkedinfluence.com*, the Complaint does not state the dates of the subject emails, the
 15 sender of the emails, the subject lines of the emails, or the landing pages referenced in the emails.
 16 Plaintiff’s failure to provide the details in its Complaint is unjustified, as its counsel admits that
 17 “Plaintiff could amend the complaint in this Action with a spreadsheet … listing the email, date, from
 18 Names, Subject Lines and Landing pages …” (Doc. No. 14-1, ¶ 5). In light of Plaintiff’s contention
 19 that the pleading defect is curable, it should be allowed leave to amend its Second Amended
 20 Complaint in the event that the Court finds its claim for violation of Section 17529.5 is not preempted.

21 **III. CONCLUSION**

22 The action should be dismissed in its entirety as Plaintiff’s claim for violation of Section
 23 17529.5 is preempted by the CAN-SPAM Act. Even if the Court disagrees that the claim is
 24 preempted, the Complaint should nonetheless be dismissed with prejudice as to Howes, as the
 25 Complaint does not allege any wrongdoing by him. Finally, the Complaint is also defective as it not
 26 pled with the particularity required by Rule 9(b).

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1 Dated: March 10, 2016

THE INTERNET LAW GROUP

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8 418 MEDIA LLC, LEWIS HOWES
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